

UIIdaho Law Digital Commons @ UIIdaho Law

Not Reported

Idaho Supreme Court Records & Briefs

11-30-2012

State v. Nielsen Respondent's Brief Dckt. 39655

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Nielsen Respondent's Brief Dckt. 39655" (2012). *Not Reported*. 744.
https://digitalcommons.law.uidaho.edu/not_reported/744

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39655, 39656
)	
vs.)	
)	
KEVIN JOHN NIELSEN,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE DARLA S. WILLIAMSON
District Judge**

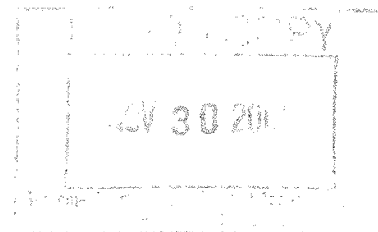
**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**NICOLE L. SCHAFER
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

**SHAWN F. WILKERSON
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712**



**ATTORNEY FOR
DEFENDANT-APPELLANT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Nature of the Case.....	1
Statement of Facts and Course of Proceedings	1
ISSUES	4
ARGUMENT	5
I. If This Case Is Assigned To The Idaho Court Of Appeals, That Court Lacks The Authority To Review The Idaho Supreme Court's Decision To Deny Nielsen's Motion To Augment The Record.....	5
A. Introduction.....	5
B. The Idaho Court Of Appeals, Should It Be Assigned This Case, Lacks The Authority To Review The Idaho Supreme Court's Decision	5
C. Even If The Merits Of Nielsen's Argument Are Reviewed On Appeal, Nielsen Has Failed To Show The Idaho Supreme Court Violated His Constitutional Rights.....	7
II. Nielsen Has Failed To Show The District Court Abused Its Sentencing Discretion.....	11
A. Introduction.....	11
B. Standard Of Review	11
C. The District Court Acted Well Within Its Sentencing Discretion In Revoking Nielsen's Probation	11
D. The District Court Acted Well Within Its Sentencing Discretion In Denying Nielsen's Oral I.C.R. 35 Motion.....	13

CONCLUSION.....	14
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Martinez v. State</u> , 92 Idaho 148, 438 P.2d 893 (1968)	7
<u>Scott v. Elo</u> , 302 F.3d 598 (6th Cir. 2002).....	8
<u>State v. Hanington</u> , 148 Idaho 26, 218 P.3d 5 (Ct. App. 2009).....	9
<u>State v. Huffman</u> , 144 Idaho, 201, 159 P.3d 838 (2007)	13
<u>State v. Moore</u> , 131 Idaho 814, 965 P.2d 174 (1998).....	11
<u>State v. Morgan</u> , 2012 WL 2782599 (Ct. App. 2012).....	6, 7, 8, 10
<u>State v. Polson</u> , 92 Idaho 615, 448 P.2d 229 (1968).....	7
<u>State v. Sanchez</u> , 149 Idaho 102, 233 P.3d 33 (2009)	11
<u>State v. Wersland</u> , 125 Idaho 499, 873 P.2d 144 (1994).....	11
<u>United States v. Smith</u> , 292 F.3d 90 (1st Cir. 2002)	7

STATEMENT OF THE CASE

Nature of the Case

Kevin John Nielsen appeals from the district court's orders revoking probation and denying his oral Rule 35 motion for reduction of sentence. Nielsen also challenges the Idaho Supreme Court's order denying his motion to augment the appellate record.

Statement of Facts and Course of Proceedings

The state charged Nielsen with four counts of grand theft and one count of possession of a controlled substance in Case No. H0401285 in September of 2004. (R., pp.41-43.) Nielsen pled guilty to three counts of grand theft by possession and the court sentenced him to two years fixed followed by twelve years indeterminate on each count, concurrent, with the court retaining jurisdiction. (R., pp.52-55, 63-66.) Nielsen completed his retained jurisdiction program and was placed on a twelve-year period of probation in July, 2005. (R., pp.72-75.)

Nielsen's first probation violation was filed in 2007, along with a new charge for possession of a controlled substance. (R., pp.91-93, 301-302.) He pled guilty to the new drug charge in Case No. H0700900 and admitted his probation violations in the grand theft case. (R., pp.339-348.) The court sentenced Nielsen to three years fixed followed by four years indeterminate in the new case and ordered he serve concurrent periods of retained jurisdiction, his second, in the two cases. (R., pp.154-156, 359-362.) Upon completion of the

second period of retained jurisdiction the court placed Nielsen back on probation in both cases. (R., pp.164-167, 374-377.)

Nielsen violated his probation a second time in 2010. (R., pp.183-185, 395-397.) The district court placed him back on probation in both the grand theft and drug cases following his admissions. (R., pp.212-214, 416-418.) A third probation violation was filed in 2011. (R., pp.215-219, 225-229, 419-426.) The district court revoked Nielsen's probation in both cases and ordered the original sentences in each case to be served concurrently with a recommendation that he be placed in the Therapeutic Community Program. (R., pp.241-243, 441-443.) At this disposition hearing, Nielsen made an oral Rule 35 motion, requesting the court reduce the fixed portion of his sentence. (2/2/12 Tr., p.20, Ls.3-5.) The court considered the motion and denied it. (2/2/12 Tr., p.20, Ls.6-18.)

Nielsen timely appealed. (R., pp.244-246, 444-446.)

After the settling of the appellate record and after Nielsen requested and was granted one extension of time to file his Appellant's brief (6/06/12 Order Granting Motion for Extension), Nielsen made a motion to suspend the briefing schedule and augment the appellate record with as-yet-unprepared transcripts of his 2004 entry of plea hearing, 2004 sentencing hearing, 2005 sentencing hearing, 2005 retained jurisdiction review hearing, 2007 admit/deny hearing, 2008 retained jurisdiction review hearing, 2010 disposition hearing and the 2008 addendum to the presentence investigation report. (7/13/12 Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof.) The

state objected in part to the motion, contesting the preparation at state expense and inclusion of the requested transcripts but not of the inclusion of the addendum to the presentence investigation report. (7/17/12 Objection in Part to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof".) The Idaho Supreme Court granted Nielsen's motion as to the addendum to the presentence investigation report and denied it as to the requested transcripts. (7/31/12 Order to Augment the Record *In Part* and to Suspend the Briefing Schedule).

ISSUES

Nielsen states the issues on appeal as:

1. Did the Idaho Supreme Court deny Mr. Nielsen due process and equal protection when it denied his Motion to Augment with the requested transcripts?
2. Did the district court abuse its discretion when it revoked Mr. Nielsen's probation?
3. Did the district court abuse its discretion when it denied Mr. Nielsen's oral Rule 35 motion requesting leniency?

(Appellant's brief, p.4)

The state rephrases the issues on appeal as:

1. Has Nielsen failed to establish that the Idaho Supreme Court violated his constitutional rights by denying his motion to augment the appellate record?
2. Has Nielsen failed to show the district court abused its sentencing discretion by revoking probation or denying his oral I.C.R. 35 motion?

ARGUMENT

I.

If This Case Is Assigned To The Idaho Court Of Appeals, That Court Lacks The Authority To Review The Idaho Supreme Court's Decision To Deny Nielsen's Motion To Augment The Record

A. Introduction

Nielsen contends that by denying his motion to augment the appellate record with as-yet-unprepared transcripts of the sentencing hearings, retained jurisdiction review hearings, probation violation admit/deny hearing, and probation violation disposition hearing from his underlying convictions for three counts of grand theft by possession and possession of a controlled substance, the Idaho Supreme Court violated his constitutional rights to due process and equal protection and has effectively denied him effective assistance of counsel on appeal. (Appellant's brief, pp.5-18.) Should this case be assigned to the Idaho Court of Appeals, however, that court lacks the authority to review the Idaho Supreme Court's decision to deny Nielsen's motion. Further, even if the Idaho Supreme Court's denial of Nielsen's motion is reviewed on appeal, Nielsen has failed to establish a violation of his constitutional rights.

B. The Idaho Court Of Appeals, Should It Be Assigned This Case, Lacks The Authority To Review The Idaho Supreme Court's Decision

Recently, the Idaho Court of Appeals "disclaim[ed] any authority to review, and, in effect, reverse an Idaho Supreme Court decision made on a motion made prior to assignment of the case to [the Idaho Court of Appeals] on the ground that

the Supreme Court decision was contrary to the state or federal constitutions or other law.” State v. Morgan, 2012 WL 2782599 * 2 (Ct. App. 2012), *petition for review pending*. Such an undertaking, the Court explained, “would be tantamount to the Court of Appeals entertaining an ‘appeal’ from an Idaho Supreme Court decision and is plainly beyond the purview of this Court.” Id.

However, the Idaho Court of Appeals did leave open the possibility of review of such motions in some circumstances. Id. Such circumstances may occur, the Court indicated, where “the completed briefs have refined, clarified, or expanded issues on appeal in such a way as to demonstrate the need for additional records or transcripts, or where new evidence is presented to support a renewed motion.” Id.

In the present case, however, the briefing has not demonstrated the need for additional transcripts in the appellate record, and Nielsen has not provided new evidence to support any renewed motion. Nielsen's argument in his Appellant's brief as to why the record should be augmented with the transcripts of the sentencing hearings, retained jurisdiction review hearings, probation violation admit/deny hearing, and probation violation disposition hearing from his underlying convictions for three counts of grand theft by possession and possession of a controlled constitute the same arguments he presented to the Idaho Supreme Court in his motion – that the district court may have relied on statements or evidence from those hearings in making its subsequent sentencing decisions. (Compare 7/13/12 Motion with Appellant's brief, pp.5-18.) Because

the Idaho Court of Appeals lacks the authority to review, and in effect, reverse a decision of the Idaho Supreme Court, and because Nielsen has failed to provide any new evidence or clarification in his Appellant's brief that would permit the Idaho Court of Appeals to do so, the Idaho Court of Appeals must decline, if it assigned this case, to review the Idaho Supreme Court's denial of Nielsen's motion to augment the record.

C. Even If The Merits Of Nielsen's Argument Are Reviewed On Appeal, Nielsen Has Failed To Show The Idaho Supreme Court Violated His Constitutional Rights

To the extent this Court considers the merits of Nielsen's constitutional claims, all of his arguments fail. As in Morgan, Nielsen argues that he is entitled to the additional transcripts because, he claims, the failure to provide them is a violation of his constitutional rights to due process, equal protection, and the effective assistance of appellate counsel. (Appellant's brief, pp.5-18.) All of Nielsen's arguments lack merit.

"A defendant in a criminal case only has a due process right to a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below." Morgan at *2 (citing cases, internal quotations omitted). To demonstrate that the record is not sufficient, the defendant must show that any omissions from the record prejudiced his ability to pursue the appeal. State v. Polson, 92 Idaho 615, 620-21, 448 P.2d 229, 234-35 (1968) (distinguishing Martinez v. State, 92 Idaho 148, 438 P.2d 893 (1968)); see also United States v. Smith, 292 F.3d 90, 97 (1st Cir. 2002). To show prejudice

Nielsen “must present something more than gross speculation that the transcripts were requisite to a fair appeal.” Scott v. Elo, 302 F.3d 598, 605 (6th Cir. 2002). Brunet has failed to carry this burden.

On appeal, Nielsen only challenges the district court’s decisions to revoke probation and deny his oral I.C.R. 35 motion. (See generally, Appellant’s brief.) The transcript of the proceedings related to those decisions is included in the record on appeal, as are the transcripts for the hearing in which Nielsen admitted his last violations and the sentencing hearing wherein Nielsen received his second period of retained jurisdiction. (See generally 2/2/12 Tr.; 1/05/12 Tr.; 11/08/07 Tr.)

Nielsen nevertheless contends this available information is inadequate for appellate review of his claims, and that the absence of his requested transcripts “will render his appeal meaningless,” because, he argues, when revoking probation, a district court “may rely upon the information it already knows from presiding over the prior hearings,” and that this reliance may only be evaluated through his requested transcripts. (Appellant’s brief, pp.11-12, 15.) This argument however, relies on mere gross speculation that the district court “may” have considered information that was presented at these hearings, but is absent from the existing appellate record. If Nielsen thought that there was specific information critical to the district court’s decision in the transcripts he now seeks, he should have presented that information to the court at the probation revocation hearing.

The state recognizes that in State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009), the Idaho Court of Appeals stated that, in reviewing a sentence that is ordered into execution following a period of probation, the Court “will examine the entire record encompassing events before and after the original judgment” and review is based “upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation.” However, this language from Hanington does not require augmentation with transcripts of all hearings from sentencing to the final revocation or rider review hearing. As explained in Morgan, such an interpretation of Hanington is too broad. Morgan at *3. The Court of Appeals clarified that although it “will not arbitrarily confine [itself] to only those facts which arise after sentencing to the time of the revocation of probation . . . that does not mean that *all* proceedings in the trial court up to and including sentencing are germane.” Id. (emphasis original). Rather, “[t]he focus of the inquiry is the conduct underlying the trial court’s decision to revoke probation.” Id. Accordingly, the Court “will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal.” Id. Because all relevant information to the district court’s decision to revoke probation and to deny Nielsen’s I.C.R. 35 motion is already included in the record on appeal, Nielsen has failed to show any due process violation resulting from the Supreme Court’s orders denying his requests for augmentation.

Nielsen's equal protection argument also lacks merit. The Court in Morgan rejected the argument that equal protection mandates augmentation of all transcripts the appellant desires, stating:

Morgan was not denied the transcripts because of indigency. Morgan was afforded the opportunity to designate not only the standard clerk's record, but also additional records necessary for inclusion in the clerk's record on appeal. He had time to review the record and make any objections, corrections, additions, or deletions prior to settling of the record, pursuant to I.A.R. 29(a). Morgan's failure to fully and timely utilize the Idaho Appellate Rules, and his failure to demonstrate the need for the transcripts in his motion to augment the record, precluded him from including the first probation violation hearing transcripts, not his indigency. Morgan's motion to augment failed to make a showing that any appellant, indigent or otherwise, would be entitled to the record as requested.

Morgan at *4. Nielsen's equal protection claim fails for the same reasons.

Finally, the Court in Morgan also rejected the assertion that the denial of a motion to augment the record on appeal results in the deprivation of the effective assistance of counsel. Morgan at *4. Nielsen, like Morgan, "has failed to demonstrate how effective assistance of counsel is not possible without the requested transcripts." Id.

All of Nielsen's claims relating to the denial of his motions to augment the record fail.

II.

Nielsen Has Failed To Show The District Court Abused Its Sentencing Discretion

A. Introduction

Nielsen next asserts that the district court abused its discretion when it revoked his probation and executed Nielsen's original sentence. (Appellant's brief, pp.18-20.) However, because Nielsen has failed to establish an abuse of discretion, this Court must affirm the district court's sentencing determination.

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. The District Court Acted Well Within Its Sentencing Discretion In Revoking Nielsen's Probation

In reviewing a probation revocation decision, this Court employs a two-step analysis. State v. Sanchez, 149 Idaho 102, 105, 233 P.3d 33, 36 (2009) (citation omitted). First, the Court considers whether the defendant violated his probation. Id. "If it is determined that the defendant has in fact violated the terms of his probation, the second question is what should be the consequences of that violation." Id. A district court's decision to revoke probation is a discretionary one that will not be overturned on appeal absent an abuse of that discretion. Id. Nielsen has failed to meet his burden of establishing the district court abused its discretion in this case.

In this case, in revoking Nielsen's probation, the district court properly considered Nielsen's significant history of drug addiction, continued failure on community supervision, repeated probation violations, failure to take advantage of the treatment opportunities provided in his two periods of retained jurisdiction, as well as mitigating factors relating to Nielsen's desire to finally address his drug addiction. (2/12/12 Tr., p.15, L.23 – p.19, L.23.) In imposing sentence, the court discussed Nielsen's lengthy history with the criminal justice system:

And this has been going on since you were age – let's see. When I first saw you were 26 years old. That was in '04, almost eight years now that I've been dealing with you off and on. And I haven't done a very good job, have I, as a Judge? I mean, you're still violating probation. You're still doing the same ol', same ol', and you're just not changing. And just now you're telling me, now I realize I've got a problem.

(2/2/12 Tr., p.18, Ls.6-15.) The court also considered the fact that Nielsen had requested a drug court screening and appeared to be making an effort (2/12/12 Tr., p.18, Ls.17-25), but ultimately determined, based on Nielsen's history, that "his addiction was controlling his behavior" and he needed benefit of the programming and structure of the prison's therapeutic community to adequately address it (2/12/12 Tr., p.19, Ls.2-23).

The district court considered all of the relevant information and reasonably determined that Nielsen was not an appropriate candidate for community supervision. Given any reasonable view of the facts, Nielsen has failed to establish that the district court abused its discretion by revoking his probation after multiple probation violations, a continued pattern of criminal behavior and a

failure to take advantage of what he learned in the process of completing two retained jurisdiction programs.

D. The District Court Acted Well Within Its Sentencing Discretion In Denying Nielsen's Oral I.C.R. 35 Motion

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Nielsen must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id.

Nielsen did not provide any new information in support of his oral I.C.R. 35 motion. Instead, he simply asked the court to "consider, in terms of a Rule 35 motion, reducing the fixed period of time on the cases." (2/12/12 Tr., p.20, Ls.3-5.) The district court denied the motion, stating:

Well, I'm just not sure that that's – I think the Therapeutic Community, you need to – you need to allow for at least two years because I think it can take a little bit just for them to get into it.

So on the one that you asked me to reduce, he's got 404 days credit on that one. So that leaves him less than two years to get the Therapeutic Community done and being eligible for parole.

...

But I will consider that you made a Rule 35 and I denied it.

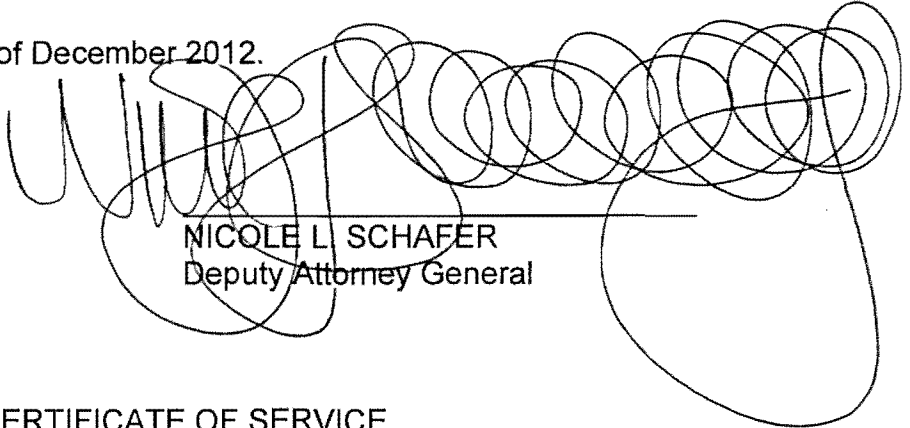
(2/2/12 Tr., p.20, Ls.6-18.)

In light of Nielsen's continued failure to demonstrate his amenability to rehabilitation, the district court's denial of Nielsen's oral Rule 35 motion and refusal to reward Nielsen with a shorter sentence and easier path to community supervision was entirely reasonable. Nielsen has failed to establish an abuse of discretion.

CONCLUSION

The state respectfully requests that this Court affirm Nielsen's sentences and the district court's order denying his Rule 35 motion.

DATED this 4th day of December 2012.



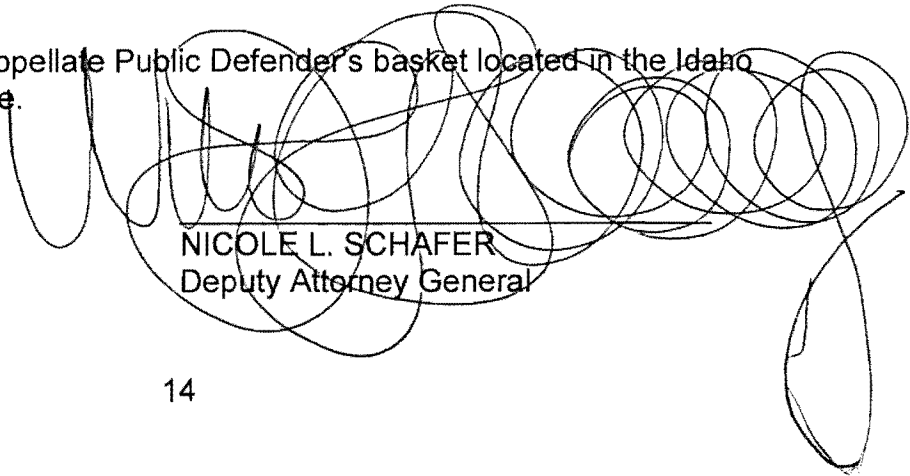
NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of November 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON
STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm